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Supreme Court, U.S.
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No. -

In the Supreme Court of the United States

October Term, 1988

RICHARD LISA
TINA LISA,
petitioners,

v.

FOURNIER MARINE CORPORATION
McALLISTER LIGHTERAGE LINE, INC.
respondents, et al.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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I

QUESTIONS PRESENTED

I. The Appeals Court erred in not finding Judge Aldrich biased and prejudiced in favor of the Respondents Fournier and McAllister.

II. The Appeals Court was wrong and erred in finding the District Court did not abuse his discretion in bifurcating the trial.

III. The Appeals Court erred in finding Judge Aldrich's rulings and charges in the first trial were proper.

IV. The Appeals Court erred in the second trial against McAllister in not finding Judge Aldrich's charge and written questions to the jury were improper and wrong.

V. The Appeals Court was wrong and erred in imposing fines on Lisa's Attorney Nathan Greenberg and adding double costs.

LIST OF PARTIES

Petitioners are Richard Lisa and Tina Lisa.

Respondents are Fournier Marine Corporation, Penobscot Bay Towing Co., Inc., and McAllister Lighterage Line, Inc.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Opinions Below	1
Jurisdiction	2
Statutes Involved	2
Statement of the Case	3
Reasons for Granting the Writ	5
I. The Appeals Court Erred in Not Finding Judge Aldrich Biased and Prejudiced in Favor of the Respondents Fournier and McAllister	5
II. The Appeals Court Was Wrong and Erred in Finding the District Court Did Not Abuse His Discretion in Bifurcating the Trial	9
III. The Appeals Court Erred in Finding Judge Aldrich's Rulings and Charges in the First Trial Were Proper	12
IV. The Appeals Court Erred in the Second Trial Against McAllister in Not Finding Judge Aldrich's Charge and Written Questions to the Jury Were Improper and Wrong	14
V. The Appeals Court Was Wrong and Erred in Imposing Fines on Lisa's Attorney Nathan Greenberg and Adding Double Costs	17
Conclusion	19
Appendix A—Opinion of the United States Court of Appeals for the First Circuit	21
Appendex B—Order of The United States Court of Appeals for the First Circuit Denying Rehearing	25
Appendix C—Judgment of the United States Court of Appeals for The First Circuit	26
Appendix D—District Court for the District of Massachusetts, Order on Motions	27

Page

Appendix E—Judgment of the District Court for the District of Massachusetts 29
Appendix F—Questions to Jury 30
Appendix G—Verdict 31

TABLE OF CITATIONS

Cases:

Ardoin v. *J. Ray McDermott & Co.*, 641 F.2d 277 (5th Cir. 1981) 13, 14
Beacon Theatres, Inc. v. *Westover, U.S. District Judge, et al.*, 359 U.S. 500 (1959) 10
Butler v. *Whiteman*, 356 U.S. 271, 78 S.Ct. 734 14
Carambo v. *Cape Cod S.S. Co.*, 123 F.2d 991 (1st Cir.) .. 14
Crowe v. *DiManno*, 225 F.2d 652 (1st Cir. 1955) .. 6, 19, 20
Grimes v. *Raymond Concrete Pile Co.*, 356 U.S. 252 14
Joseph E. Bennett Co. v. *Trio Industries*, 306 F.2d 546 (1st Cir. 1962) 7
Offshore Co. v. *Robeson*, 266 F.2d 769 (5th Cir. 1959) .. 14
R.E. Linder Steel Erection Co., Inc. v. *Wedemyer Cernick* v. *Becker, Becker and Pannell Inc.*, 585 F.Supp. 1530 (D.C. Maryland 1984) 11
Senko v. *LaCrosse Dredging Co.*, 352 U.S. 370 14

Statutes and Rules:

28 U.S.C. § 1254 (1) 2
§ 1332 2
46 U.S.C. § 688 ..... 2, 3
Federal Rules of Appellate Procedure:
Rule 38 ..... 17, 19
Federal Rules of Civil Procedure:
Rule 11 ..... 5, 19
Rule 42(b) 10

Miscellaneous:

9 C. Wright & A. Miller, *Federal Practice & Procedure*, § 2388 (1971) 11

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The petitioners Richard Lisa, et al respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit, entered in the above-entitled proceeding on February 3, 1989.

Opinions Below

The opinion of the Court of Appeals for the First Circuit is reported at 866 F.2d 530, and is reprinted in the appendix hereto.

The memorandum decision of the United States District Court for the District of Massachusetts (Aldrich, D.J.) has not been reported. It is reprinted in the appendix hereto.

Jurisdiction

Date of entry of judgment in the Court of Appeals against Petitioners Lisa's was February 3, 1989;

Date of denial of rehearing of Petitioners Lisa's by order of Court of Appeals on March 14, 1989;

The jurisdiction of the Court to review the Judgment of the Court of Appeals for the First Circuit is invoked under 28 U.S.C. § 1254(1).

Statutes Involved

(1) The action of Petitioners Lisa against Fournier is predicated on the Jones Act, 46 U.S.C. § 688 which was invoked in filing the case in the District Court against Fournier. Section 688 reads:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. ..."

(2) The actions of Petitioners Lisa's against Respondent McAllister is based on 28 U.S.C. § 1332 which reads:

"(a) The District Court shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between —

(1) citizens of different states."

Statement of the Case

The action of Petitioners Richard Lisa, et al against Fournier was predicated on the Jones Act 46 U.S.C.A. Sec. 688. The action of the Lisas against McAllister was based on diversity of citizenship and a claim of over ten thousand ($10,000) dollars, giving jurisdiction to the United States District Court.

The Petitioners Richard Lisa and Tina Lisa, his wife, filed complaints in the United States District Court in Massachusetts against Respondents Penobscot Bay Towing Company, Inc. and Fournier Marine Corporation. Both these corporations are owned by Arthur Fournier and will be referred to hereafter as "Fournier". Lisa later joined McAllister Lighterage Line, Inc. as a party defendant. Brian McAllister was president of this corporation, and it will be referred to hereafter as "McAllister". The two other crew members who died immediately during the tragic accident to Richard Lisa on April 11, 1985, were William Fournier, son of Fournier, and Daniel Govoni. Both William Fournier and Daniel Govoni were attempting to rescue Richard Lisa from a tank in Barge 175 when the tragedy occurred. Lawsuits brought by the mother of William Fournier and the family of Daniel Govoni were settled.

Richard Lisa was 21 years old when he was injured. He lived in Maine and graduated from Belfast High School. He held various jobs, including eight months work at McDonalds before his accident. He was married to Tina Lisa in August of 1983 and had two little children. In June of 1984, his father Willis Lisa persuaded Fournier, who owned a number of tugs and barges, to hire Richard as a worker in Belfast, Maine, to assist him in his

business of docking and undocking vessels in various ports in Maine. Richard at first worked part time and then during the latter part of September worked full time until his accident on April 11, 1985. That morning Lisa worked on the tug HARTFORD before he proceeded into the tank on Barge 175 that had insufficient oxygen and collapsed.

Barge 175 had been purchased by Fournier sometime in December of 1984 from Brian McAllister. The barge had not been used for two or three years before Fournier brought it to Searsport, Maine, where it remained for about three months and then was towed to Belfast, Maine.

Richard was in a coma for 11 days and has been totally disabled since his accident because of his inability to walk correctly and trouble with his memory and vision due to his brain damage. He is unable to drive an automobile. Dr. Lehrich, a neurologist from the Massachusetts General Hospital, saw him in May of 1986, and last examined him again on June 4, 1987. Dr. Lehrich testified that Lisa had brain damage, memory and vision impairment and unsteadiness, and was of the opinion he was totally disabled and would never work again. Dr. Lessel, a specialist from the Massachusetts Eye and Ear Infirmary, examined Lisa and confirmed loss of peripheral vision because of brain damage.

Fournier had a P & I policy of insurance covering all of his tugs and barges. He had never placed Barge 175 under this policy when he took possession of it in December, 1984. Instead, he had a policy to provide for compensation under the Longshoremen and Harbor Workers' Act and because of his failure to place Barge 175 under his seaman's policy which has paid Lisa a total of $190 per week since his accident. Richard Lisa was never told about Fournier's failure to put Barge 175 under his existing policy. Lisa never agreed to receiving benefits, as he was convinced he was a seaman and was injured on a vessel, and his remedy was an action under the Jones Act as a seaman.

After two separate jury trials and predicated on the way the jury answered the special questions, the Court first entered

judgment for Fournier and after the second trial, entered judgment for McAllister. After the first trial, Fournier and McAllister filed a stipulation of dismissal with prejudice of all claims, cross-claims and counter-claims between themselves.

The appellant Lisa made motions to set aside the judgments against him and find for Lisa and, in addition, sought a new trial. Judge Aldrich, in his order of April 12, 1988, denied all of Lisa's motions. Judge Aldrich mentioned F.R. Civ. P. Rule 11 in his order but did not invoke it against Greenberg, attorney for the Lisas. The Appeals Court in its per curiam opinion of five pages, dated February 3, 1989, conceded Lisa had a tragic accident and suffered serious permanent injuries on the barge from lack of oxygen. The Appeals Court rejected all Lisa's claims of bias and unfair conduct by Judge Aldrich and imposed penalties and double costs based on F.R.A.P. Rule 38 on Greenberg despite Judge Aldrich's failure to apply Rule 11.

Appellant Lisa petitioned for a rehearing and also rehearing en banc of the six appeal judges in the First Circuit. The Appeals Court, in its order of March 14, 1989, denied Lisa's petition for rehearing and rehearing en banc, stating a majority of the judges had supported the denial. The order was not unanimous, and either one or two Circuit judges obviously favored a rehearing en banc for Lisa.

Reasons For Granting the Writ

I. The Appeals Court Erred in Not Finding Judge Aldrich Biased and Prejudiced in Favor of the Respondents Fournier and McAllister

Lisa's lawsuit was entered in May 1985. The case was assigned to Judge Tauro a District Court Judge of Massachusetts. A case normally stays with the assigned judge for all proceedings until it is disposed of. In January, 1988, Lisa filed a motion for a speedy trial by Judge Tauro as at that time the case had been pending close to three years. This motion was never allowed by Judge Tauro. In March, 1988, Judge Aldrich had the case evidently transferred to him by Judge Tauro for jury trial.

Greenberg, attorney for the Lisas, had been before Judge Aldrich in many personal injury cases involving claims for seamen, longshoremen and fishermen during the years he sat in the District Court in jury cases and in appeals that Judge Aldrich would take part in when he was a Circuit Court Judge. Judge Aldrich has been retired for years from the Appeals Court but continues to preside over cases assigned to him by the District Court judges. He sits for a number of weeks hearing both jury cases and cases without a jury. He also sits in the Appeals Court. Greenberg from his long experience before Judge Aldrich was of the opinion that in personal injury cases of seamen, longshoremen and fishermen Judge Aldrich tended to always favor the shipowners and/or their insurer. Greenberg decided that because of the excellent liability in the two claims against Fournier and McAllister and the disastrous injuries sustained by Lisa, Judge Aldrich would be fair. Greenberg was wrong and made a horrendous mistake in this conclusion.

The Appeals Court finds Judge Aldrich was not biased. The Appellant in his brief relied on the Appeals Court decision about 30 years ago in the case of *Crowe* v. *DiManno*, 225 F.2d 652 (1st Cir. 1955). This case found District Court Judge McCarthy in this jury trial was biased in favor of a young girl who sustained an amputation of her leg above the knee in an automobile and truck collision. The Appellant in this case was defended by an insurance company.

In Appellant's petition for a rehearing en banc, it was pointed out to the Appeals Court that in the *Crowe* case (supra) the Appeals Court read 800 pages of testimony in finding the District Court biased. The Appeals Court nullified the jury verdict and remanded the case to another District Court Judge for a new trial. The Appeals Court in Lisa's case never mentioned the *Crowe* decision either in its Per Curiam opinion or in its order denying a rehearing en banc.

Petitioners do not know if the three Appeals Court Judges that decided this case read the entire transcript of evidence

that contained about 800 pages. Appellants, however, are convinced if the Supreme Court reads the entire transcript that they can only conclude Judge Aldrich was biased against the appellants together with their counsel.

The Appeals Court cites the case of *Joseph E. Bennett Co.* v. *Trio Industries*, 306 F.2d 546, 549 (1st Cir. 1962) was a ruling that it is insufficient to establish bias based on Judge Aldrich's rulings on evidentiary and procedural matters. The *Bennett* case *(supra)* was decided about 26 years ago. Surely, if the Supreme Court finds that Judge Aldrich made consistent crucial adverse rulings and findings against appellant that shows bias in favor of appellees, the *Bennett* case should not be followed.

The exclusion of the testimony of David Dubois offered by McAllister in the first trial and Richard Amirault, appellants' witness, in the second trial are discussed on page 3 of the Court's opinion. Dubois who was a Coast Guard Inspector for years testified that Barge 175 was a vessel. No objections were made to his testimony. Judge Aldrich just before his charge told the jury his entire testimony was irrelevant. Amirault, Appellants' expert, in the second trial against McAllister was a graduate of the Massachusetts Maritime Academy with experience in the U.S. Merchant Marines and spent years as the head of OSHA in the states of New Hampshire, Maine and Vermont where he had extensive experience as to safety. Judge Aldrich found he was unqualified as an expert and gave no reasons as to why he was unqualified and would not let him give his opinion at the trial that McAllister failed to act in a safe way when he sold the barge to Fournier. Both Judge Aldrich's rulings as to Dubois and Amirault evidenced bias by the Court.

Judge Aldrich referred to an incident that happened to Greenberg 25 or 30 years ago during a lobby conference. Greenberg argued that was bias by Judge Aldrich. Greenberg moved to disqualify Judge Aldrich and at a hearing on the motion the court asserted that Greenberg objected to Leonard Langer, a Portland, Maine lawyer of the firm of Thompson,

McNaboe, Ashley and Bull, joining as a defense lawyer and that 25 or 30 years before lawyers in Portland, Maine, had objected to Greenberg being present as a lawyer and that Greenberg succeeded in going to Portland, Maine. Judge Aldrich would not allow Greenberg to explain and ended the conversation on this issue. The Appeals Court in its opinion wrote that Judge Aldrich adequately explained what happened and the remarks of Judge Aldrich were not biased. Greenberg opposed the participation of Attorney Langer because the Respondents already had three firms opposing Petitioners and he felt it was unfair to bring in another lawyer as the Respondents had adequate representation. The fact that Attorney Langer came from Maine had nothing to do with Greenberg's objection to his participation. Actually, although Greenberg was not a member of the Federal Bar in Maine, he was prevented for one year by Judge Gignoux from practicing in the Federal Court in Maine on charges instituted by a trial lawyers' association that Greenberg had solicited cases. Greenberg was finally reinstated and was able to try cases in the Maine Federal Court. Surely, Judge Aldrich exhibited bias against Petitioners by mentioning this incident of so many years ago.

Other instances of bias by Judge Aldrich are:

(1) Fournier's P & I Insurance Policy that the Judge allowed in evidence. Fournier never extended the policy to Barge 175 when he acquired it despite the fact all his other tugs and barges were covered by this policy. Judge Aldrich told the jury there was no hull insurance on Barge 175 evidently to bolster Fournier's claim Barge 175 was not a vessel. Petitioner sought to show Fournier's failure to list Barge 175 was to save money and was the reason he was securing $190 weekly under the Longshoremen & Harbor Workers Act.

(2) Also, during the formation of the jury, Judge Aldrich granted Respondents an extra challenge

after all their lawyers had exhausted their three challenges indicates bias against Petitioners.

(3) Refusal to permit questioning of Lisa as to his condition in the hospital after his accident to refute Fournier's counsel's contention in his opening that Lisa had agreed to accept compensation under the Longshoremen and Harbor Workers' Act.

Once again, to really understand why counsel for Lisa asked Judge Aldrich at the end of the first trial to remove himself from the case and his further claim of bias after the second trial, the Supreme Court should read carefully the entire transcript.

II. The Appeals Court Was Wrong and Erred in Finding the District Court Did Not Abuse His Discretion in Bifurcating the Trial

On page 2 of its opinion the Appeals Court writes:

> "By separating the issues of appellant's status and the status of the barge from the rest of the case, the court avoided needlessly confusing the jury with multiple, and mutually exclusive, theories of liability. Moreover, appellant has failed to assert any material prejudice resulting from the bifurcation."

Did the District Court exercise a proper discretion in his bifurcation order? Assume the jury answered his Questions 1 and 2 at the first trial of Fournier "Yes", the Court would then have to have a further jury trial on liability and damages as to Fournier. Lisa's trial against McAllister was next in line. The jury could not hear liability and damages in the McAllister trial, as McAllister would be prejudiced. So, it would seem three separate trials would be necessary. The Petitioners would be prejudiced regardless of how the first trial concluded.

Rule 42(b) of F.R.C.P. empowered the District Court to bifurcate the trials if it is in the interest of convenience and will avoid delay and prevent prejudice and always preserve inviolate the right of trial by jury as declared by the seventh amendment to the Constitution or as given by a statute of the United States.

Judge Aldrich, before the second trial of *Lisa* v. *McAllister*, decided that evidence of sales of barges and tugs by McAllister to Fournier before the accident should be heard only by the Court and would not be a jury issue. The Petitioners had a burden of showing McAllister was a dealer at the time Barge 175 was sold to Fournier. The District Court heard without the jury evidence of sales by Fournier and McAllister.

Rule 42(b) certainly was violated by Judge Aldrich in excluding the jury from hearing the evidence McAllister was a dealer at the time Barge 175 was sold to Fournier.

In the case of *Beacon Theatres, Inc.* v. *Westover U.S. District Judge, et al.*, 359 U.S. 500 (1959), the Supreme Court in an anti-trust action reversed the 9th Circuit Court of Appeals and District Court's finding that under Rule 42(b) F.R.C.P., the District Court could hear the case without a jury. The Court wrote at page 508:

> "Viewed in this manner, the use of discretion by the trial court under Rule 42(b) to deprive Beacon of a full jury trial on its counterclaim and cross-claim as well as on Fox's plea for declaratory relief cannot be justified. ..."

The Court further stated at page 510:

> "... Since the right to jury trial is a constitutional one, however, while no similar requirement protects trials by the Court, that discretion is very narrowly limited and must, wherever possible, be exercised to preserve jury trial. ..."

In *R.E. Linder Steel Erection Co., Inc.* v. *Wedemyer Cernick* v. *Becker, Becker and Pannell Inc.*, 585 F.Supp. 1530 (D.C. Maryland 1984), the District Court denied defendant's motion for a bifurcated trial and stated at page 1534:

> "Bifurcation of trials is intended to further convenience, avoid delay and prejudice and to serve the ends of justice. ..." See Sec. 2388, Vol. 9 *C. Wright & A. Miller Federal Practice & Procedure* (1971).

The Appeals Court in its opinion asserts that Appellant has failed to show any prejudice from bifurcation. Immediately after the first trial which Fournier won, Fournier and McAllister dismissed with prejudice all claims and cross-claims between themselves. Both Fournier and McAllister had been friends for years before Richard Lisa's accident. In the McAllister trial, Fournier testified at length for the benefit of McAllister. Fournier testified about some incident to another barge telling his employees the danger when you open a hatch, where a crew member was taken out on a stretcher and a picture appeared in the Portland Press Herald. Fournier could not find the picture but counsel for McAllister had the picture and introduced it. Judge Aldrich admitted it over Petitioners' objection as an exhibit. Fournier further explained the procedures of safety taken when entering a sealed tank with regard to oxygen. Lisa was prejudiced as to the jury in the McAllister trial with the crucial question by Judge Aldrich, "Was Arthur Fournier fully aware at the time of sale of there being a possible dangerous atmosphere in the barge's confined tanks?" The jury, with Fournier's testimony, had to find the way they did in answering "yes" and ending the case for McAllister. If there was no bifurcation and only one trial for Lisa against Fournier and McAllister, there would have been no prejudice, as there would be no dismissals and no question No. 1 as the Court gave in McAllister's second trial.

The District Court committed serious error in bifurcating

the Fournier and McAllister cases. It resulted in inconvenience, delay and prejudice to the Petitioners. Further, the District Court violated the mandate of Rule 42(b) that Petitioners' constitutional right to a jury trial should be preserved when he heard evidence without the jury. The bifurcation was an injustice to the Petitioners. From any fair reading of the testimony it was obvious that Fournier and McAllister conspired together to see that Lisa would lose both cases and receive no justice in Judge Aldrich's Court. Fournier and McAllister succeeded.

III. The Appeals Court Erred in Finding Judge Aldrich's Rulings and Charges in the First Trial Were Proper

Petitioner contended Barge 175 was a vessel. McAllister through its counsel was able to have Fournier agree that after the accident Barge 138 was sold and continued to be a vessel despite renovations made on Barge 138 similar to Barge 175.

McAllister then offered testimony of David Dubois that Barge 175 was a vessel. He testified on the issue of whether Barge 175 was a vessel and that his investigation showed Barge 175 was documented by the United States Coast Guard on the day of Lisa's accident and the last document was issued on January 27, 1986. Barge 175 required documentation if it engaged in coastwide trade. The Court told the jury between counsel's arguments to strike out all of Dubois' testimony as it was not relevant to any issues in the case and the jury was to disregard everything Dubois had said.

The Court denied Lisa's motions to rule that Barge 175 was a vessel and Lisa was a seaman at the time of his accident.

The Court's charge with respect to question 1, the vessel issue, favors throughout the defendant Penobscot Bay Towing Company. The court stated the fact the object is on water does not make it a vessel and Barge 175 moving up and down with the tide doesn't make it a vessel. Further, the Court states we are interested only in April 1985 and not what the situation

was in New Jersey before the accident. And the fact the structure is at a dock it ceases to be a vessel if it is permanently or more or less permanently moved to a dock, it is not a vessel. A single movement for changing its location does not turn it into a vessel. If there is some reasonable prospect it is going to be used for navigation it is a vessel. In *Ardoin* v. *J. Ray McDermott & Co.*, 641 F.2d 277 (5th Cir. 1981), the Fifth Circuit in a searching analysis of applicable cases wrote at page 281:

> "In assessing the question whether the record contains evidence to suggest that Ardoin was "permanently assigned" to a vessel, we note at the outset that it is well established that one need not be indefinitely and invariably assigned to one vessel in order to achieve the "permanent" connection required by this prong of the Robinson analysis. The permanency requirement may be satisfied by assignment to a specific fleet of vessels." (citing cases)

Fournier made his money docking and undocking large vessels. The evidence is undisputed that in the ten months he worked Lisa's duties included docking and undocking vessels.

Petitioner contends Lisa was a seaman. Lisa's job was not confined to Barge 175. He worked as a seaman at one time or another on all of Fournier's barges and vessels and in the morning of the accident he worked on the tug HARTFORD that was being repaired.

With question No. 2: was Lisa a seaman on April 11, 1985, the court told the jury:

> "Let me illustrate. John Jones is a deckhand. Everytime his employer's tug goes out or a tug goes out he ships aboard. The tug doesn't go every day. So he fills in his time with maintenance work. He is a seaman. If John Smith's primary occupation is to do ship maintenance work and very occasionally, when his employer is shorthanded on the tug, he fills in, you would probably find that he was not a

seaman. But think of the nature of the work, the nature of his connection with that work, and what his primary substantial employment."

Lisa objected to this charge. In *Senko* v. *LaCrosse Dredging Co.*, 352 U.S. 370, *Grimes* v. *Raymond Concrete Pile Co.*, 356 U.S. 252, *Butler* v. *Whiteman*, 356 U.S. 271, 78 S.Ct. 734 (1st Circuit case), *Offshore Co.* v. *Robeson*, 266 F.2d 769 (5th Cir. 1959) and *Carambo* v. *Cape Cod S.S. Co.*, 123 F.2d 991 (1st Cir.), these decisions say to be a seaman is established if (1) an employee was working on a vessel in navigation, (2) employee had more or less permanent connection with that vessel and (3) the employee was aboard the vessel primarily to aid in navigation. Lisa certainly was a seaman. He worked on all of Fournier's tugs and barges at one time or another during his 10 months employment. The morning of his accident he worked on the tug HARTFORD which was being repaired to return to active service.

The Court in its charge should have told the jury that Lisa was assigned to a fleet of tugs and barges at one time or another and the work he did on these vessels compel a conclusion that he was a seaman. A person may be a seaman on more than one vessel. See *Ardoin supra; Offshore Co.* v. *Robeson, supra; Magnolia Towing Co.* v. *Pace*, 378 F.2d 12 (5th Cir. 1967).

The jury in answer to written questions 1 and 2 found "No" that Barge 175 wasn't a vessel and Lisa wasn't a seaman and answered question 4 leaving blank whether he was a longshoreman and answered "Yes" that he was engaged in ship repair. Based on the answers of the jury, Judge Aldrich dismissed the case against Fournier. Judge Aldrich should have ruled as a matter of law that Barge 175 was a vessel and Lisa was a seaman in the first trial.

IV. The Appeals Court Erred in the Second Trial Against McAllister in Not Finding Judge Aldrich's Charge and Written Questions to the Jury Were Improper and Wrong

The Appeals Court is silent and say nothing in their opinion about the District Court charge to the jury and the special questions in the trial against McAllister.

McAllister sold Barge 175 a few months before Lisa's accident. Petitioners' case against McAllister was that no inspection of the dangerous tank was made by McAllister before the sale to Fournier and no warnings were given Fournier to inspect the tank that caused the tragedy.

Fournier admitted that in his first deposition in July, 1985, he couldn't recall what payment was made and he said nothing about warranties. There were no warnings from McAllister and Fournier wasn't told the tanks were not inspected.

The testimony of Brian McAllister by his deposition of June 26, 1986, and his testimony at the second trial establish that he had no records concerning Barge 175. During the deposition he testified Barge 175 lay idle for a year or two before Fournier took it away in December of 1984. At the trial he changed this testimony by saying the Barge was unused for two or three months. When Lisa's counsel questioned him at the trial that he had previously testified in his deposition that the barge was unused for a year or two McAllister suggested he examine his records. He had made it clear in his deposition that there were no records.

Fournier as a witness for McAllister at the trial testified that Mazzeral was never ordered by him to take the cover off the tank. He conceded he was good friends with McAllister for years. He was uncertain in his deposition as to what payments he made when the barge was first sold to him. Fournier, like McAllister, had a problem when a flood hit his office and spoiled his files. Both McAllister and Fournier worked to save each other from Lisa's lawsuit. They were good friends determined that Lisa recover nothing and they were successful. The Court should have entirely rejected their testimony.

In his charge to the jury, the Court once again employed special questions and stated:

"When we come to Question No. 1, 'Was Mr. Arthur Fournier an ignorant person or was he knowledgeable?' I won't discuss the evidence on that. You heard plenty of it. And you heard more about it this morning. If he was knowledgeable at that time, even if Mr. Fournier—excuse me—even if Mr. McAllister didn't warn him about it, if he knew, that is, Mr. Fournier knew, then that is the end of the case. If you find that he did not know, then you come to the second question, 'By April 11, prior to the time of the accident, did he then know of the possibility of the dangerous atmosphere inside the tank?' If you answer "No" to both of these questions, you come to damages."

Counsel for Lisa at the bench stated he was satisfied. The jury returned within an hour and answered "Yes" to Question No. 1 which ended the case and judgment was entered for McAllister.

Greenberg made a mistake in answering he was satisfied. However, the Court had previously conferred at least twice in the lobby with all counsel and would not have changed Questions 1 and 2 anyway. There was no Court Reporter present. Lisa had given him special questions that pertained to McAllister who was being sued and they were rejected. McAllister was being sued for breach of warranty and negligence but his name wasn't mentioned in the two crucial questions. Fournier had already won Lisa's lawsuit against him and now the Court was making Fournier a party once again. Judge Aldrich's charge with his questions was unfair and shocking and didn't present the contested issues to the jury. Lisa cannot understand the Court bringing Fournier into the case as the wrongdoer after previously fairly ruling that the tank was dangerous and unsafe.

Lisa is suing McAllister in the second trial. The District Court doesn't ask a question of whether McAllister in selling Barge 175 to Fournier a few months before the accident was

negligent or breached a warranty as to Fournier. The District Court instead substitutes Fournier who is McAllister's long-time friend as the defendant in the case and has already escaped liability in the first trial. The special questions in the second trial as well as the first trial appear in the appendix.

V. The Appeals Court Was Wrong and Erred in Imposing Fines on Lisa's Attorney Nathan Greenberg and Adding Double Costs

Judge Aldrich in denying Petitioner Lisa's Motions for Vacation and a new judgment and/or trial wrote in part:

> "The court regrets to say that only by construing its application highly subjectively does it not invoke F.R. Civ. P. 11. This is perhaps an error on the court's part, in view of the rule's use of the word 'shall'."

The Appeals Court applied FRAP 38 and as companion judges with Judge Aldrich took offense at Greenberg's claims that Judge Aldrich was biased during the trial. The Appeals Court in its opinion wrote:

> "We believe this is an appropriate case in which to assess against appellant's counsel personally appellees' costs and reasonable attorneys' fees on appeal. The absence of meaningful argument in the brief filed on behalf of appellant rendered this appeal frivolous and needlessly burdened appellees. (citing cases) To avoid further litigation, we set the amount of the attorneys' fees on appeal as being $750 to appellee Penobscot Bay Towing Co., Inc., $750 to appellee McAllister Lighterage Line, Inc., and $750 to appellee Fournier Marine Corp.
>
> *Affirmed. Double costs and a reasonable attorney's fee of $750 to each appellee, to be paid personally by appellant's counsel.*"

The Appeals Court completely ignores the Appellant Richard Lisa who will never work again; whose wife and two little children have to survive on $190 a week and the few dollars that Lisa's wife can earn as a waitress. It seems more reasonable to conclude that the panel judges in the Appeals Court were upset about Greenberg's motions to Judge Aldrich that he get off the case after the first trial because of his bias and prejudice and his similar motion after the second trial. Judge Aldrich talked about Rule 11 and regretted not invoking it against Greenberg. The Judges in the Appeals Court took offense because Greenberg raised the issue of the bias of Judge Aldrich. The claim that Lisa's appeal was frivolous has no basis whatsoever. The Appeals Court could have ruled in Appellant Lisa's favor. The liability was perfect against both appellees and the injuries to Lisa were devastating. Instead, the Appeals Court turned on counsel Greenberg and unfairly charged him with incompetence and a frivolous appeal and needlessly burdening the appellees and did nothing to help Appellant.

Greenberg in fact worked on this case for almost four years. The case involved depositions in New York City, Belfast, Maine and Boston, extensive court appearances, endless research and investigation and about a week of trial before Judge Aldrich and then all the work involved in the appeal to the Court of Appeals. Greenberg advanced personally over $25,000.00 in expenses on the case and has not received one cent for the extensive hours he devoted to the case as the appellants are without funds. Greenberg has been a lawyer for 57 years and for close to 50 years he has represented injured seamen, longshoremen and fishermen in jury trials and appeals primarily in the courts in Massachusetts and New York. He has been in the Appeals Court at least 25 times during these years. He had never been censured or had fines and double costs imposed on him as an attorney before the Lisa case.

Greenberg sought help in his appeal to the Appeals Court from the Massachusetts Bar Association, Boston Bar Associa-

tion and Association of Trial Lawyers of America. He is a member of the last two associations. He sought their help by way of amicus curiae brief. All three associations were sympathetic to Lisa's plight but none of them would help. Only the Massachusetts Lawyers' Weekly displayed any courage and fairness when it printed a letter from Greenberg criticizing the fines and double costs imposed on him by the Appeals Court under Rule 38.

Lawyers are afraid to offend Judges in any way no matter how wrong a judge may be in his rulings. Now that the Judges in the Federal System have Rule 38, the fear of lawyers is increased. A prominent lawyer who Greenberg sent his brief to told him to withdraw the appeal as he might be disbarred.

Lawyers representing injured people have enough problems making a living and do not need judges fining them for the benefit of appellee lawyers who are paid for everything they do. The trial lawyer for the injured person lose cases as well as win some and many times take a substantial loss.

The Supreme Court should cancel out Greenberg's fines and double costs and recommend that Rule 38 and Rule 11 be abolished. The Federal Judges and Appeal Courts Judges have enough power and definitely do not need these rules. The Massachusetts Supreme Court has refused to adopt a similar Rule 11 to apply in State Court cases. Rules 11 and 38 violate a lawyer's constitutional right in that the lawyer has no notice of charges and no opportunity to defend himself. Most importantly is the possibility that lawyers will hesitate to challenge a judge or take an appeal fearful that the Appeals Court will apply Rule 38 and penalize them personally. Ultimately the people bringing personal injury claims will be the real casualty of the oppressive rules.

Conclusion

For the reasons set forth, the petition for certiorari should be granted. The First Circuit in *Crowe* v. *DiManno*, 225 F.2d

652 (1st Cir. 1955) read nearly 800 pages of testimony and found the District Court biased and granted a new trial before another judge. The real party in interest in the *Crowe* case was an insurance company. In this appeal, the Appeals Court failed to find bias by the District Court. The appellant has appealed to the Supreme Court in this petition to read the entire transcript convinced that bias of the District Court is present and overwhelming. Of most importance, the appeal is on behalf of a crippled worker who will never work again.

The case should be returned to the First Circuit with an order to enter judgment for Appellant in the Fournier case finding Lisa was a seaman and Barge 175 was a vessel; and that the First Circuit should order a trial for damages or, in the alternative, order a complete new trial; and that the McAllister case should be returned to the First Circuit with an order that the judgment for the respondents be vacated and a new trial be allowed. The First Circuit should be further ordered to return the case to the District Court to have a judge, other than Judge Aldrich, comply with the Supreme Court's order.

Fines and double costs against Greenberg should be cancelled out.

Petitioners are aware that it is difficult to have the Supreme Court accept a petition for certiorari. This petition involves a plea for justice for Appellant Lisa, and, if allowed, would establish that it is not only the powerful that secure justice in America, but the poor as well.

Respectfully submitted,

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Boston, Massachusetts 02109
(617) 227-8390
Attorney for Petitioners

Appendix A

United States Court of Appeals
For the First Circuit

No. 88-1441

RICHARD LISA and TINA LISA,

PLAINTIFFS, APPELLANTS,

v.

FOURNIER MARINE CORPORATION, ET AL.,

DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[HON. BAILEY ALDRICH, *Senior U.S. Circuit Judge*]

Before

CAMPBELL, *Chief Judge*,

COFFIN AND SELYA, *Circuit Judges*.

Nathan Greenberg for appellants.

Richard H. Pettingell with whom *D. Alice Olsen*, *Morrison, Mahoney & Miller*, *Leonard W. Langer* and *Thompson, McNaboe, Ashley & Bull* were on brief for appellee Penobscot Bay Towing Company, Inc.

Timothy R. McHugh with whom *Stephen M. Ouellette* and *Hoch & McHugh* were on brief for appellee Fournier Marine Corporation.

Thomas J. Muzyka with whom *Seth S. Holbrook* and *Clinton & Muzyka, P.C.*, were on brief for appellee McAllister Lighterage Line, Inc.

FEBRUARY 3, 1989

---

*Of the First Circuit, sitting by designation.

PER CURIAM. This case arises out of a tragic accident in which appellant suffered serious permanent injuries when he entered a sealed compartment on a barge and collapsed from lack of oxygen. Appellant filed a ten-count complaint against four defendants[1], and in a bifurcated trial the jury held for the defendants on all claims. Appellant now appeals, alleging a host of evidentiary and procedural errors as well as a general bias against him on the part of the district court. We affirm, finding that the district court conducted the trial in a proper and impartial manner.

In his brief, appellant does little more than list the many wrongs that he believes the district court committed while trying this case, presenting little or no discussion of any of them. Although we could hold that those issues listed but not discussed are waived, *cf. Mahanor* v. *United States*, 192 F.2d 873, 877 (1st Cir. 1951) (issue stated as point on appeal but not argued in brief is waived), we instead have considered each claim and found no reversible error. We make only the following observations:

1. The district court did not abuse its discretion in bifurcating the trial. *See* Fed. R. Civ. P. 42(b); 5 J. Moore, J. Lucas & J. Wicker, *Moore's Federal Practice* ¶ 42.03[1] at n.6 (1988). By separating the issues of appellant's status and the status of the barge from the rest of the case, the court avoided needlessly confusing the jury with multiple, and mutually exclusive, theories of liability. Moreover, appellant has failed to assert any material prejudice resulting from the bifurcation.

2. The district court acted properly in excluding the testimony of expert witnesses David Dubois and Richard Amirault. Appellant neither objected at trial to exclusion of Dubois' testimony nor explains on appeal why it was erroneous or how he was harmed. With regard to Amirault's testimony, the court was well within its discretion in concluding that the proferred "expert" was unqualified. In addition, the exclusion

[1] One defendant was dismissed before trial.

of the evidence regarding the dangerous nature of the sealed compartment on the barge, including an OSHA citation, was harmless. The court explicitly instructed the jury that the unsealed compartment was dangerous, and the jury decided that Fournier was aware of that dangerous condition. Thus, exclusion of Amirault's testimony about the dangerousness of the barge and whether McAllister should have warned Fournier did not harm appellant.

3. Appellant objected at trial that the court's instruction on the definition of a "vessel" differed from the statutory definition of the term, and was not sufficiently "comprehensive." On appeal, he does not raise the statutory point, but instead cites several specific parts of the charge as given in the course of an argument that the instruction generally favored the defendant. We are unclear about the precise nature of appellant's dissatisfaction with this charge, primarily because counsel's objections at trial bear little resemblance to his argument on appeal. For this reason alone, appellant's claim could be rejected. *See Wells Real Estate* v. *Greater Lowell Board of Realtors*, 850 F.2d 803, 809 & n.5 (1st Cir. 1988) ("An exception on one ground cannot serve as the basis for another, on a different ground, on appeal."). In addition, we note that a court need not adopt verbatim a party's proposed instructions, *see United States* v. *Gibson*, 726 F.2d 869, 874 (1st Cir. 1984). It is therefore incumbent upon an appealing party to explain what was erroneous about a disrupted charge rather than merely to describe how the instruction differed from the party's ideal.

On the instruction concerning whether appellant was a seaman, appellant seems to argue that the court should have told the jury that the evidence "compel[led] a conclusion that he was a seaman." We disagree. Defendants presented evidence showing that appellant worked primarily as a general laborer and not as a seaman, and the jury was permitted to credit that testimony over conflicting evidence from appellant. In addition, contrary to appellant's suggestion in his brief, the court did instruct the jury that appellant could be considered

a seaman if he had been assigned to a fleet of vessels, as well as to a single vessel.

4. Appellant's allegations of bias on the part of the district court consist almost entirely of complaints that the court ruled against him on evidentiary and procedural matters. This is insufficient. *See Joseph E. Bennett Co.* v. *Trio Industries*, 306 F.2d 546, 549 (1st Cir. 1962) (a charge of judicial misconduct "is never supported by mere reference to adverse rulings and findings"). The only claim not connected to the judge's rulings concerns a reference made by the court to appellant's counsel's representation of clients in Maine. This comment was not made within the presence of the jury, and was explained adequately by the court during a hearing on appellant's disqualification motion. We therefore reject appellant's suggestion that we reverse the judgment below and remand for a new trial because of bias on the part of the district court.

5. We believe this is an appropriate case in which to assess against appellant's counsel personally appellees' costs and reasonable attorneys' fees on appeal. The absence of meaningful argument in the brief filed on behalf of appellant rendered this appeal frivolous and needlessly burdened appellees. *See Lozano* v. *Banco Central Y Economias*, No. 88-1592, slip op. at 2-3 (1st Cir. Jan. 11, 1989); *Larsen* v. *Empresas El Yunque, Inc.*, 812 F.2d 14, 16 (1st Cir. 1986); Fed. R. App. P. 38 and 28 U.S.C. § 1927. To avoid further litigation, we set the amount of the attorneys' fees on appeal as being $750 to appellee Penobscot Bay Towing Co., Inc., $750 to appellee McAllister Lighterage Line, Inc., and $750 to appellee Fournier Marine Corp.

Affirmed. Double costs and a reasonable attorney's fee of $750 to each appellee, to be paid personally by appellant's counsel.

Appendix B

United States Court of Appeals
For the First Circuit

No. 88-1441

RICHARD LISA and TINA LISA,
PLAINTIFFS, APPELLANTS,
v.
FOURNIER MARINE CORPORATION, ET AL.,
DEFENDANTS, APPELLEES.

BEFORE
CAMPBELL, *Chief Judge*,
COFFIN, *Senior Circuit Judge*,
BOWNES, BREYER, TORRUELLA AND SELYA, *Circuit Judges*.

ORDER OF COURT
ENTERED: MARCH 14, 1989

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc both be denied.

By the Court:

FRANCIS P. SCIGLIANO
Clerk.

Appendix C

United States Court of Appeals
For the First Circuit

No. 88-1441

RICHARD LISA and TINA LISA,
PLAINTIFFS, APPELLANTS,
v.
FOURNIER MARINE CORPORATION, ET AL.,
DEFENDANTS, APPELLEES.

JUDGMENT
ENTERED: FEBRUARY 3, 1989

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

Double costs and a reasonable attorney's fee of $750 to each appellee, to be paid personally by appellant's counsel.

By the Court:

FRANCIS P. SCIGLIANO
Clerk.

Appendix D

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO.
85-1786-T-A

RICHARD LISA AND TINA LISA,
PLAINTIFFS,
v.
FOURNIER MARINE CORPORATION, ET AL.,
DEFENDANTS

ORDER ON MOTIONS
April 12, 1988

Plaintiff's motions for vacation, new judgment, and new trial are denied, and, because of such total absence of merit, without a hearing. Passing irrelevancies, much of what counsel says is unwarranted; some was ruled on, with explanation, at trial; some is completely unfounded. As a particular example of the last, (page 6 of Greenberg affidavit), "The questions were completely unfair and confusing. ... The Court was in complete error in the wording of these unfair questions" (meaning the second set), it is to be noted that the substance, and wording, of what questions should be put were extensively discussed in the lobby before final settling, and not only were the ultimate questions not objected to, but they were affirmatively agreed on, as appears of record. The court further notes that the questions were legally correct, and the jury's answer fully supported.

The court regrets to say that only by construing its application highly subjectively does it not invoke F. R. Civ. P. 11. This is perhaps an error on the court's part, in view of the rule's use of the word "shall."

Motions denied.

/s/BAILEY ALDRICH
*Senior Circuit Judge**

*Sitting by designation

Appendix E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CASE NO.
85-1786-A-(T)

RICHARD LISA
TINA LISA,
v.
FOURNIER MARINE CORP.
PENOBSCOT BAY TOWING CO., INC.
McALLISTER BROTHERS INC., AND
McALLISTER LIGHTERAGE LINE, INC.

JUDGMENT IN CIVIL CASE

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED that, on the basis of the special findings,

JUDGMENT FOR THE DEFENDANTS

Approved as to form:

/s/ BAILEY ALDRICH
Bailey Aldrich, S.C.J.

April 7, 1988

GEORGE F. McGRATH
Clerk

GEORGE A. HOWARTH
(By) Deputy Clerk

Appendix F

No. 85-1786T-A

RICHARD and TINA LISA

v.

McALLISTER LIGHTERAGE, INC.

QUESTIONS TO JURY

1. Was Arthur Fournier fully aware, at the time of sale, of there being a possibly dangerous atmosphere in the barge's confined tanks?

Yes __x__

No _____

If you answer Question No. 1, Yes, that is the end of the case. If you answer, No,

2. On April 11, 1985, prior to the accident, was Arthur Fournier fully aware of there being a possibly dangerous atmosphere in the barge's confined tanks?

Yes _____

No _____

If you answer Question No. 2, Yes, that is the end of the case. If you answer, No,

3. What were Richard Lisa's damages?

$_____

4. What were Tina Lisa's damages?

$_____

WILLIAM G. NOWLIN
Foreman
4/4/88

Appendix G

No. 85-1786T-A

Lisa v. *Fournier Marine, et al*

VERDICT

1. On April 11, 1985, was Barge 175 a vessel?

Yes _____

No __x__

2. On April 11, 1985, was plaintiff a seaman?

Yes _____

No __x__

3. If you answer questions Nos. 1 *and* 2 Yes, was plaintiff on April 11, 1985, a seaman serving aboard Barge 175?

Yes _____

No _____

4. If you answer question No. 2 No, was plaintiff on April 11, 1985,

(a) a longshoreman? _____

or

(b) engaged in ~~ship building~~, (ship repair) or ~~ship breaking~~?

_____

(It must be either (a) or (b). Check one.)

WILLIAM G. NOWLIN
Foreman

Supreme Court, U.S.
FILED
AUG 11 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-2030.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1988.

RICHARD LISA AND
TINA LISA,
Petitioners,
v.

FOURNIER MARINE CORPORATION,
McALLISTER LIGHTERAGE LINE, INC., AND
PENOBSCOT BAY TOWING CO., INC.
Respondents.

RESPONDENT McALLISTER LIGHTERAGE LINE, INC.'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

THOMAS J. MUZYKA,
Counsel of Record,
SETH S. HOLBROOK,
CLINTON & MUZYKA, P.C.,
One Boston Place,
Boston, Massachusetts 02108.
(617) 723-9165
Attorneys for Respondent
McALLISTER LIGHTERAGE LINE, INC.

August 11, 1989

Questions Presented.

I. Whether the petition meets the standards set forth in Supreme Court Rule 17.

II. Whether the Court of Appeals correctly held that the trial court acted within its discretion in bifurcating the trial into a status phase and a liability/damages phase.

III. Whether the Court of Appeals correctly held that the trial court properly stated the law regarding seaman status in his charge to the jury and that petitioners failed to explain their objection to the charge on vessel status.

IV. Whether the Court of Appeals correctly held that the trial judge acted within his discretion by hearing evidence as to other sales outside the jury.

V. Whether the Court of Appeals correctly held that the trial court properly submitted the two written questions to the jury at the close of the liability and damages trial.

VI. Whether the Court of Appeals correctly held that petitioners' allegations that the trial judge was not impartial and was prejudiced were insufficient.

List of Parties.

Petitioners are Richard Lisa and Tina Lisa.

Respondents are Fournier Marine Corporation, Penobscot Bay Towing Co., Inc., and McAllister Lighterage Line, Inc.

Rule 28.1 Statement.

McAllister Lighterage Line, Inc. is wholly owned by McAllister Brothers, Inc. McAllister Brothers, Inc. is wholly owned by McAllister Towing and Transportation Company, Inc. McAllister Towing and Transportation Company, Inc. is a closely held corporation.

Table of Contents.

Questions Presented	i
List of Parties	ii
Rule 28.1 Statement	iii
Table of Contents	v
Table of Authorities	vi
Statute Involved	2
Statement of the case	3
Reasons why a writ of certiorari should not be granted	4
I. The petition fails to meet the standards set forth in Supreme Court Rule 17	4
II. The Court of Appeals correctly held that the trial court acted within its discretion in bifurcating the trial into a status phase and a liability/damages phase	6
III. The Court of Appeals correctly held that the trial court properly stated the law regarding seaman status in his charge to the jury and that petitioners failed to explain their objection to the charge on vessel status	7
IV. The Court of Appeals correctly held that the trial judge acted within his discretion by hearing evidence as to other sales outside the jury	8
V. The Court of Appeals correctly held that the trial judge acted within his discretion by hearing evidence as to other sales outside the jury	10
VI. The Court of Appeals correctly held that petitioners' allegations that the trial judge was not impartial and was prejudiced were insufficient	14
Conclusion	15

TABLE OF AUTHORITIES.

CASES.

Bennett v. Perini Corp., 510 F.2d 114 (1st Cir. 1975) 7, 8

Bevard v. Ajax Mfg. Co., 473 F.Supp.35 (E.D. Mich 1979) 11

Crummet v. Corbin, 475 F.2d 816 (6th Cir. 1973) 6

Cruz v. Texaco, Inc., 589 F.Supp.777 (S.D. Ill. 1984) 12

Joia v. Jo-Ja Service Corp., 817 F.2d 908 (1st Cir. 1987) 11

Joseph E. Bennett Co. v. Trio Industries, Inc., 306 F.2d 546 (1st Cir. 1962) 15

McPhail v. Culebra, 598 F.2d 603 (1st Cir. 1979) 12

Morris v. Travisono, 528 F.2d 856 (1st Cir. 1976) 11

Pugh v. S.C. Hutchinson Co., 565 F.2d 375 (5th Cir. 1978) 10

Scott v. Isbrandtsen Co., 327 F.2d 113 (4th Cir. 1964) 10

Stapinski v. Walsh Construction Co., Inc., 395 N.E. 2d 1251 (Ind. 1979) 13

Sukljian v. Charles Ross and Son Co., 503 N.E. 2d 1358 (N.Y. 1986) 13

STATUTES AND RULES.

33 U.S.C. § 905(b) 2, 6

Federal Rules of Appellate Procedure
Rule 38 5

Federal Rules of Civil Procedure
Rule 11 5
Rule 42(b) 6, 7

Rule 49(a) 11
Rule 51 10, 11

Federal Rules of Evidence
Rule 402 8
Rule 403 8
Rule 611 9

Supreme Court Rules
Rule 17 1, 4

MISCELLANEOUS.

Restatement (Second) of Torts, § 388 12, 13

No. 88-2030.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1988.

RICHARD LISA AND
TINA LISA,
PETITIONERS,

v.

FOURNIER MARINE CORPORATION,
McALLISTER LIGHTERAGE LINE, INC., AND
PENOBSCOT BAY TOWING CO., INC.
Respondents.

RESPONDENT McALLISTER LIGHTERAGE LINE, INC.'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

The respondent, McAllister Lighterage Line, Inc., respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the First Circuit's opinion in this case. That opinion is reported at 866 F.2d 530.

Statute Involved.

33 U.S.C.S. § 905(b) states:

> (b) In the event of injury to a person covered under this Act caused by the negligence of a vessel, then such person; or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 33 of this Act [33 USCS 933], and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this Act.

Statement of the Case.

The respondent (defendant) wishes to supplement the petitioners' (plaintiffs') statement of the case as follows:

Prior to the taking of evidence, numerous motions were filed by the defendants individually and jointly. The most notable was a joint motion by all defendants that the trial be bifurcated to determine the status of the plaintiff, Richard Lisa, and whether the Barge 175 was a vessel. Judge Aldrich heard arguments on this motion and allowed defendants' motion for a bifurcated trial.

On March 24, 1988, evidence commenced on the threshold issue of plaintiff's status and whether the Barge 175 was a vessel on the date of Richard Lisa's injury. After two days of evidence, special questions were formulated by the court with the assistance of counsel and presented to the jury. The jury found that the Barge 175 was not a vessel and that the plaintiff was a harbor worker engaged in the repair of the Barge 175. After this determination by the jury, all counts against Fournier Marine Corporation consisting of the Counts I through IV inclusive were dismissed. Similarly, Counts IV and V against Penobscot Bay Towing Co., Inc. were also dismissed. The claim against McAllister Lighterage Line, Inc. in paragraph 26 alleging breach of warranty of seaworthiness was similarly dismissed.

At the conclusion of the status portion of the trial, the only remaining defendant in the action was McAllister Lighterage Line, Inc. The trial proceeded forward upon the allegations set forth in paragraph 27 of the amended complaint alleging negligence for a failure to warn of a dangerous condition. The evidence on this portion of the case commenced on March 30, 1988. After four days of testimony, Judge Aldrich, with the assistance and agreement of all counsel, propounded two questions to the jury for their deliberation. After closing arguments

and charge to the jury, the jury retired to deliberate and returned an answer in the affirmative to the first question, "Was Arthur Fournier fully aware, at the time of sale, of there being a possibly dangerous atmosphere in the barge's confined tanks?" Pursuant to the court's instructions, this concluded the action by dismissal of the amended complaint against McAllister Lighterage Line, Inc. Judgment was entered by the Court on April 7, 1988, dismissing the count against McAllister Lighterage Line, Inc.

The plaintiffs filed motions for vacation of judgment, new judgment and new trial. Judge Aldrich considered these motions and denied plaintiffs' motions on April 7, 1988.

On April 21, 1988, the plaintiffs filed their notice of appeal.

The First Circuit affirmed the decisions below on February 3, 1989 and assessed double costs and attorneys' fees against the plaintiff. A petition for rehearing and suggestion for a rehearing en banc was denied on March 14, 1989.

Petitioners filed their petition for a writ of certiorari on June 12, 1989.

Reasons Why a Writ of Certiorari Should Not Be Granted.

I. THE PETITION FAILS TO MEET THE STANDARDS SET FORTH IN SUPREME COURT RULE 17.

Supreme Court Rule 17 provides a review on writ of certiorari will be granted only when there are special and important reasons therefor. The petitioner's argument for review is a mere reiteration of their Court of Appeals argument. The Petition presents no conflict among the Circuit Courts of Appeal in respect to the issues in this case. No valid basis has been presented in the petition which indicates that the First Circuit has so far departed from the accepted and usual course of

judicial proceedings as to warrant review by this Court. The First Circuit fully considered and correctly decided the issues below.

In respect to the petitioners' claims regarding Rules 11 and 38, the respondent states these allegations are immaterial and beyond the scope of review of this Court. Rule 38 of the Rules of Federal Appellate Procedure provides "[i]f a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee." Rule 38 is the correlative appellate rule of Rule 11 of the Federal Rules of Civil Procedure. Rule 11 provides for the striking of pleadings and the imposition of disciplinary sanctions to check abuses in the signing of pleadings.

The issues presented in the petition are not worthy of the Court's valuable time and resources. The issues simply are not ones of national importance. The *Lisa* decision below is not unique because it involves injuries sustained by a ship repairer. The number of ship repairers constitutes an extremely minute fraction of this country's population. The number of ship repairers who are injured, and whose cases are tried to juries is an even smaller fraction, if such a group of individuals can even be identified. Any decision by the Court on the issues raised in petitioners' brief will have an effect on so few people in this country that the issue does not warrant the time of this Honorable Court. This Honorable Court will be addressing issues presented to it this term which will have dramatic effects on much greater segments of our population.

In view of the common nature of this case, the lack of conflict among the circuits over the issues presented, and the lack of conflict between the opinion below and the applicable decisions of this Court, review by this Honorable Court is not warranted.

II. The Court of Appeals Correctly Held That the Trial Court Acted Within Its Discretion in Bifurcating the Trial into a Status Phase and a Liability/Damages Phase.

Rule 42(b) of the Federal Rules of Civil Procedure provides that a trial judge may bifurcate the trial of a matter into separate trials ". . . in furtherance of convenience or to avoid prejudice or when separate trials will be conducive to expedition and economy. . ." The ordering of separate trials on issues is within the sound discretion of the trial judge. *Crummett* v. *Corbin*, 475 F.2d 816 (6th Cir. 1973).

In the case below, several complex issues regarding the applicable standards of care and liability of the various defendants were directly affected by a determination of whether the plaintiff, Richard Lisa, was a seaman or a harbor worker. The applicable law was also directly affected by a determination of whether the Barge 175 was or was not a vessel on April 11, 1985.

As presented to the trial court, a separate trial on the issues of the plaintiff's status and the status of the Barge 175 as a vessel will be dispositive and will prevent an unnecessary trial on liability and damages. If the jury found that the plaintiff was not a Jones Act seaman, then the plaintiffs' exclusive remedy would be supplied by the Longshoremen and Harbor Workers Compensation Act. The Court would, therefore, not need to address the issue of Jones Act negligence, unseaworthiness and maintenance and cure under the General Maritime Law. Likewise, if the determination is made that the Barge 175 is not a vessel, the Court will not need to address the defendants' potential 33 U.S.C. § 905(b) negligence.

Plaintiffs' counsel had been aware of defendants' request for bifurcation as early as the pre-trial conference before Judge Tauro on March 16, 1987, some twelve months before argu-

ment to the trial court. Upon hearing, plaintiff did not present any meritorious objection as to why trial should not be bifurcated other than for witness inconvenience.

The determination of the plaintiff's status and the Barge 175 status were crucial threshold findings to the remaining issues at trial. The jury's determination on the status issue eliminated unsupported allegations, dismissed two defendants from the remainder of the trial and reduced all the legal allegations to a single count of negligence against McAllister Lighterage Line, Inc. This clearly supports the propriety of the court's ruling fostering both an expeditious determination and judicial economy.

The Court of Appeals correctly held that the trial court acted properly within its discretion by ordering separate trials for the purposes as those set forth in Rule 42(b).

III. The Court of Appeals Correctly Held That the Trial Court Properly Stated the Law Regarding Seaman Status in His Charge to the Jury and That Petitioners Failed To Explain Their Objection to the Charge on Vessel Status.

The Court of Appeals properly found that the plaintiffs' appeal argument concerning the charge on vessel status was without merit. In their petition for certiorari, the petitioners have only restated and reiterated this position without clarification.

In the charge concerning seaman status, the trial court properly instructed the jury concerning the factors to be considered and found necessary in determining whether Mr. Lisa was a seaman. The instructions presented by the trial court were legally correct and consistent with the First Circuit's decision in *Bennett* v. *Perini Corp.*, 510 F.2d 114 (1st Cir. 1975).

Plaintiffs' counsel initially admitted that he did not have any objections to the charge. Then in lobby, plaintiffs' counsel raised certain objections to the charge. The charge by the court clearly followed the standards of *Bennett*, *supra*. The court provided the plaintiffs with a charge covering the "fleet assignment" concept and adequately instructed the jury on the requirements necessary to be found a seaman.

Likewise, the charge concerning the vessel's status was proper and within the requirements of the controlling case law.

IV. The Trial Judge Acted within His Discretion by Hearing Evidence As to Other Sales Outside the Jury.

Federal Rule of Evidence 402 provides that relevant evidence is generally admissible. Rule 403 limits this admissibility by providing that "although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. . . ."

Prior to trial, McAllister Lighterage Line, Inc. filed a motion in limine concerning sales made by other "McAllister entities" to the Fournier Marine Corporation and Penobscot Bay Towing Company, Inc. This motion was filed in anticipation of the plaintiffs' counsel intention to offer evidence that various other McAllister corporations had sold used equipment to buyers in the past. The relevant evidence, however, was that only two used barges had been sold by McAllister Lighterage Line, Inc. to Penobscot Bay Towing Company, Inc. in the last two years. During the oral argument on the motion, the trial court ruled in favor of McAllister Lighterage Line, Inc. on the motion in limine. The trial court then agreed, after a colloquy with plain-

tiffs' counsel, to hear the proffered evidence in the absence of the jury for the purpose of reconsidering its ruling should the court find that the evidence was relevant.

Following the initial status phase of the trial, the trial court again met with counsel to discuss the presentation of evidence concerning McAllister Lighterage Line, Inc.'s sales of used equipment. The issue of other McAllister corporations sales as evidence of McAllister Lighterage Line, Inc.'s status as a merchant was reviewed. The trial judge then confirmed his agreement to hear this evidence outside of the jury. This was acceptable to plaintiffs' counsel during the conference. This ruling actually was in plaintiffs' favor because it provided the opportunity to hear the evidence, and then if necessary, to have it heard by the jury.

The decision of the trial court to hear the evidence of the other sales was consistent with Fed. R. Evid. 611, which provides the court *shall* exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence. It was also by agreement of the parties.

The evidence of other instances of disposing of used equipment by other McAllister corporations was superfluous and would only have confused the jury and was not relevant. The plaintiff had not pled that McAllister Lighterage Line, Inc. was a merchant as part of his negligence claim nor had he pled a claim for strict liability. There were no amendments at trial to conform to the evidence and the only theory of recovery against McAllister Lighterage Line, Inc. was that it negligently failed to warn Penobscot Bay Towing Company of the condition of the barge when it disposed of this used equipment.

There was no evidence presented through the testimony of Arthur J. Fournier or Brian McAllister, which supported a claim that McAllister Lighterage Line, Inc. was a merchant in the sale of barges. The only evidence elicited at trial was consistent with the argument presented in McAllister Lighter-

age Line, Inc.'s motion in limine regarding sales: to wit, McAllister Lighterage Line, Inc. had, on two occasions over many years sold used equipment to Fournier interests that it no longer needed.

The trial court acted within his discretion by taking this evidence outside the jury. Plaintiff waived raising this issue by agreeing to this procedure in chambers. Even if the trial court did abuse its discretion, it was harmless error as the plaintiff had not pled a claim based upon strict liability or breach of warranty and all the evidence supported a finding that McAllister Lighterage Line, Inc. was not in the business of selling barges.

V. The Trial Court Properly Submitted the Two Written Questions to the Jury at the Close of the Liability and Damages Trial.

The petitioners have assigned as error the form of the special interrogatories submitted to the jury and the charge concerning those questions. This was not raised by the plaintiffs at the Appeals Court level and now for the first time is argued before this Honorable forum.

The number and form of special interrogatories rests in the sound discretion of the trial judge. *Scott* v. *Isbrandtsen Co.*, 327 F.2d 113 (4th Cir. 1964). The failure to object to the form of special interrogatories is reviewed under the same standard as the failure to object to a jury instruction. *Pugh* v. *S.C. Hutchinson Co.*, 565 F.2d 375 (5th Cir. 1978)

Rule 51 of the Federal Rules of Civil Procedure provides: "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which

he objects and the grounds of his objection." *Joia* v. *Jo-Ja Service Corp.*, 817 F.2d 908 (1st Cir. 1987).

Prior to closing arguments and the charge to the jury, counsel met with the trial judge to discuss the form of the special interrogatories to be submitted to the jury pursuant to Fed. R. Civ. P. 49(a). Both parties had previously submitted their written requests for special questions to the court. After a discussion of the proposed requests by McAllister Lighterage Line, Inc.'s counsel, the following colloquy occurred:

THE COURT: Fine and dandy. Any comments, Mr. Greenberg?
MR. GREENBERG: No, Your Honor.
THE COURT: Fine. Let's see if we can find the jury.

Counsel met with the trial judge following the charge to the jury and upon inquiry by the trial judge, plaintiff's counsel stated, "I am satisfied." The plaintiffs therefore, are barred from raising the issue of an improper jury charge in the appeal. *Morris* v. *Travisono*, 528 F.2d 856 (1st Cir. 1976)

The respondent submits that there was no error in the framing of the special questions. The questions were in accordance with the present state of the law and the evidence presented at trial. The evidence at trial clearly established that in selling the Barge 175 to Penobscot Bay Towing Company, McAllister Lighterage Line, Inc. was disposing of used equipment, for which it no longer had use. There was no evidence presented at trial that McAllister Lighterage Line, Inc. was a merchant or a seller regularly engaged in the business of selling barges. Therefore, since the plaintiff pled a negligence theory only, the standard to which McAllister Lighterage Line, Inc. was to be held was that of "a reasonably prudent seller under the existing circumstances." See *Bevard* v. *Ajax Mfg. Co.*, 473 F.Supp. 35 (E.D. Mich 1979).

This duty is analogous to the standard set forth in the Restatement (Second) of Torts, § 388:

> One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for use, it is supplied if the supplier:
>
> (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied; and
>
> (b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition; and
>
> (c) fails to exercise reasonable care to inform them of its dangerous condition for the facts which make it likely to be dangerous.

In *Cruz* v. *Texaco, Inc.*, 589 F.Supp. 777 (S.D. Ill, 1985), the estate of a driver of a winch truck sued the former owner (Texaco) who had sold the truck to the decedent's employer. The plaintiff alleged Texaco negligently failed to warn the driver that the winch truck should not be driven at high speeds while carrying heavy objects. Texaco moved for summary judgment on the grounds that the dangerous condition was understood by decedent's employer and that the truck had been sold "as is." The court granted summary judgment for Texaco after examining two factual issues: whether the employer knew about the danger and whether the employer was sufficiently involved in directing the use of the truck. See *McPhail* v. *Municipality of Culebra*, 598 F.2d 603 (1st Cir. 1979).

In the case below, the jury found that Arthur Fournier, the principal of Penobscot Bay Towing Co., Inc., knew and appreciated the danger of entering confined spaces. Also, the only evidence presented at trial was that Penobscot Bay Towing Co., Inc. had a small crew of which the plaintiff was a member, that Arthur J. Fournier directly supervised its employees and conducted regular meetings with the crew. At the time of the injury, Arthur J. Fournier was present, near the barge, acting in a supervisory capacity.

Similarly, in *Stapinski* v. *Walsh Construction Co., Inc.*, 395 N.E.2d 1251 (Ind. 1979), the Indiana Supreme Court upheld the granting of summary judgment to a non-dealer seller of a truck which had been sold "as is, where is" to an employer whose driver was in an accident with the plaintiff. Although it expressly did not accept or reject § 388, the court held that a non-dealer who sells a motor vehicle "as is" cannot be liable to a bystander. *Id.* at 1254.

The Court of Appeals of New York recognized the application of § 388 in a similar factual situation to the instant case in *Sukljian* v. *Charles Ross and Son Co.*, 503 N.E. 2d 1358 (N.Y. 1986). General Electric, the remote seller of a grinding mill on an "as is" basis moved for summary judgment on plaintiff's claims of negligence and strict liability. The Court of Appeals held that a remote seller who invited the inspection of the mill by the purchaser and who sold the mill on an "as is" basis was not liable under negligence or strict liability for a failure to warn of the mill's defects. In dicta, the court noted "at most, the duty of a casual or occasional seller would be to warn the person to whom the product is supplied of known defects that are not obvious or readily discernible." *Id.* at 1362, citing Restatement (Second) of Torts, § 388.

Similarly, in the instant case, Arthur J. Fournier on behalf of Penobscot Towing Co., Inc. purchased the barge on an "as is, where is" basis from a casual seller. The jury's finding that

Arthur J. Fournier had knowledge of the possibly dangerous atmosphere thus relieves McAllister Lighterage Line, Inc. of liability for Lisa's accident.

VI. The Court of Appeals Correctly Held That Petitioners' Allegations That the Trial Judge Was Not Impartial and Was Prejudiced Were Insufficient.

The Court of Appeals held that plaintiffs' allegations of bias were insufficient. McAllister Lighterage Line, Inc. submits that the trial was conducted in a fair manner. The trial court, in fact, made several rulings that were adverse to McAllister Lighterage Line, Inc. and favorable to the plaintiff.

For example, the trial court struck the entire testimony of David DuBois, an expert called by McAllister Lighterage Line, Inc. Further, the trial court ruled that the atmosphere inside the void compartment was a defective condition and that the barge was dangerous when it was sold by McAllister Lighterage Line, Inc. The trial court also permitted the admission into evidence and the testimony of plaintiffs' expert concerning a June, 1987, medical report which was not provided to McAllister Lighterage Line, Inc.'s counsel despite an outstanding request for production of documents.

Other examples of the trial court's favorable rulings in favor of the plaintiffs and impartiality were that it denied McAllister Lighterage Line, Inc.'s motion to bifurcate the liability and damages on the second phase of the trial. McAllister Lighterage Line, Inc. had moved for bifurcation on the grounds that evidence of the plaintiffs' substantial damages will prejudice the jury's determination as to the defendant's liability. The trial court also ruled that there was *no evidence of contributory negligence* on the part of the plaintiff even though Arthur J. Fournier, the plaintiff's supervisor, testified that he had

instructed the crew on several occasions as well as leaving literature available in the office concerning to safe tank entry procedures.

As the First Circuit panel pointed out, a charge of judicial misconduct is never supported by mere reference to adverse rulings and findings. See *Joseph E. Bennett Co.* v. *Trio Industries, Inc.*, 306 F.2d 546 (1st Cir. 1962).

The allegation that the judge was unfair is without substantive merit and is singularly biased. A review of the record establishes that the trial court correctly applied the law and gave ample opportunity to the plaintiffs to present their claims.

Conclusion.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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